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C&S Wholesale Grocers, Inc., et al.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;

Plaintiff,

vs.

HAWAIIAN EXPRESS SERVICE,  
INC., et al.,

Defendants.

- ) CIVIL NO. CV03-00385 SOM-LEK
- ) (Copyright)
- )
- ) DEFENDANT C&S WHOLESALE
- ) GROCERS, INC.'S RENEWED EX
- ) PARTE MOTION FOR WRIT OF
- ) EXECUTION OR IN THE
- ) ALTERNATIVE FOR JUDGMENT
- ) CREDITOR'S BILL IN EQUITY;
- ) MEMORANDUM IN SUPPORT OF
- ) MOTION; DECLARATION OF LEX R.
- ) SMITH; EXHIBITS "A" THROUGH
- ) "F"; [PROPOSED] ORDER
- ) GRANTING C&S WHOLESALE
- ) GROCERS, INC.'S RENEWED EX
- ) PARTE MOTION FOR WRIT OF
- ) EXECUTION OR IN THE
- ) ALTERNATIVE FOR JUDGMENT
- ) CREDITOR'S BILL IN EQUITY;
- ) CERTIFICATE OF SERVICE

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DEFENDANT C&S WHOLESALE GROCERS, INC.'S RENEWED EX PARTE  
MOTION FOR ISSUANCE OF WRIT OF EXECUTION AFTER JUDGMENT  
OR IN THE ALTERNATIVE FOR JUDGMENT  
CREDITOR'S BILL IN EQUITY

Judgment creditor, C&S Wholesale Grocers Inc., by and through its attorneys Kobayashi, Sugita & Goda, hereby moves this Honorable Court to issue a Writ of Execution or, in the alternative, grant a Creditor's Bill in Equity, directing the Deputy Sheriff of the State of Hawaii to hold an auction and sell the following property of judgment-debtor, Wayne Berry, or as much of it as is necessary to satisfy the following debts of Mr. Berry: (1) the federal Tax Lien in the amount of \$44,639.79 plus penalties and interest recorded against Mr. Berry on February 1, 2000 in favor of the Internal Revenue Service and against Wayne F. Berry and his spouse, a true copy of which is attached hereto as Exhibit "A"; and (2) the judgment entered herein in favor of C&S Wholesale Grocers, Inc. in the amount of \$84,758.98 plus interest accrued thereon; and (3) any claims of the other judgment creditors herein who may elect to join in this motion.

The specific assets C&S seeks to have sold pursuant to this motion are the following:

**A. Thirty-Seven (37) Copyrights Registered In The U.S. Copyright Office**

<b><u>U.S. Copyright Office Registration Number</u></b>	<b><u>Name Filed With U.S. Copyright Office</u></b>	<b><u>Date Mr. Berry Claims He Authored The Work</u></b>	<b><u>Date Mr. Berry Registered The Work</u></b>
1. TXu001302627	FCS1993, container inventory database program, version 1.0.	2993 (sic)	2006-05-03
2. TXu001340302	FCS1993 crystal report, arrival notice, version 1.0.	1996	2006-03-24

3.	TXu001340295	FCS1993 crystal report, daily transportation schedule, version 1.0.	1998	2006-03-24
4.	TXu001340300	FCS1993 crystal report, equipment planning, version 1.0.	1998	2006-03-24
5.	TXu001340301	FCS1993 crystal report, inbound container dock schedule, version 1.0.	1998	2006-03-24
6.	TXu001340299	FCS1993 crystal report, load plan, version 1.0.	1996	2006-03-24
7.	TXu001302623	FCS1993, crystal report, pallet tags, version 1.0.	1997	2006-05-03
8.	TXu001302625	FCS1993, crystal report, profitability report, version 1.0.	1998	2006-05-03
9.	TXu001302624	FCS1993, crystal report, receiving report, version 1.0.	1998	2006-05-03
10.	TXu001340296	FCS1993 crystal report, sailing chart, version 1.0.	2993 (sic)	2006-05-03
11.	TXu001340297	FCS1993 crystal report, trucking (FTL) version 1.0.	1998	2006-03-24
12.	TXu001340298	FCS1993 crystal report, trucking (LTL) version 1.0.	1998	2006-03-24
13.	TXu001302626	FCS1993, EDI 875 PO database program, version 1.0.	2993 (sic)	2006-05-03
14.	TXu001277726	FCS1993 SQL export queries (used to export and translate freight control system data, database structures and data organization to text, CSV, XLS and MDB file formats)	1999	2006-03-24
15.	TXu001302622	FCS1993, terminal reporting system, version 1.0.	1998	2006-05-03
16.	TX0005079439	FlemingPO	1993	1999-10-19
17.	TX0005079445	Freight control system.	1993	1999-10-19

18.	TX0005268865	Prepaid vendor invoice definition for Crystal reports.txt : Crystal report professional v6.0 (32-bit)— report definition.	1999	2001-05-21
19.	TX0004583894	CALL.EXE	1993	1997-05-06
20.	TX0004544547	CAPTURE.EXE	1993	1997-05-06
21.	TX0004544386	CLK COM.EXE	1993	1997-05-06
22.	TX0004544385	CLK DDE.EXE	1993	1997-05-06
23.	TX0005079443	DUPLO.EXE	1993	1999-10-19
24.	TX0005079444	EMBLEM.EXE	1993	1999-10-19
25.	TX0004544383	Except.exe	1993	1997-04-25
26.	TX0005079440	LOOKUP: KNB version 4.0	1993	1999-10-19
27.	TX0004544545	MASTER.EXE	1993	1997-05-06
28.	TX0005079442	MVR_DOS.exe.	1993	1999-10-19
29.	TX0004544384	MVRAPP.EXE.	1993	1997-05-06
30.	TX0004565070	MVRDB.DBD	1993	1997-04-28
31.	TX0005079441	MVRDBD.DBD.	1993	1999-10-19
32.	TX0004544388	PAYMENT.EXE.	1993	1997-05-06
33.	TX0005079438	STATUS : KNB version 4.0.	1993	1999-10-19
34.	TX0004544387	TIMEDB2.DDL.	1993	1997-05-06
35.	TX0005079437	UPDATE : KNB version 4.0.	1993	1999-10-19

36.	TX0004544382	USAGE.EXE.	1993	1997-05-06
37.	TX0004544546	VIEW.EXE	1993	1997-05-06

Wayne Berry has testified under oath that he is the author of each of the above referenced works and that he has received no income from them for the past ten years. A copy of the relevant pages from his judgment-debtor examination is attached hereto as Exhibit "B."

**B. Mr. Berry's Right, Title And Interest, If Any To The Following Unregistered Works**

This motion further seeks to have sold at public auction Mr. Berry's right title and interest in the following "works" which are not registered in the U.S. Copyright Office or otherwise specifically identified:

1. The computer programs described in paragraphs 102 and 109 of the Second Amended Complaint filed herein on June 18, 2004 as "no less than 30 of the other programs created by Mr. Berry" that Berry claims "remained on the Fleming server when it was sold to C&S" (paragraph 102); and Mr. Berry's methods, program devices, and techniques, as evidenced by the at least 30 additional programs" (paragraph 109). A copy of relevant pages from the Second Amended Complaint is attached hereto as Exhibit "C."

2. The thousands of works, which Mr. Mr. Berry described in his deposition in this case as follows:

Q How many trade secrets do you contend the defendants in this case have misappropriated from you, sir?

A It's a lot. I'm not sure. Like I say, we'd need to review the Guidance images to determine that.

Q Can you estimate it, sir?

A It's got to be in the thousands.

...

Q Thus far at least, you have not actually listed a conclusive list of what those trade secrets are; am I right?

A I produced a list, which I believe you have a copy of it. It's an unruly list. It's got 26, 27,000 suspect file names.

Deposition of Wayne Berry Taken May 18 2005, pages 79-80 (copies attached).

3. Any and all of Wayne Berry's Right Title And Interest To Any of the approximately 27,000 computer files on the list attached hereto as Exhibit "D"<sup>1</sup> which Mr. Berry produced in this case claiming it contained his trade secrets.

**C. All Computer Programs Authored By Mr. Berry That Are Part Of, Or Work With, The Software Mr. Berry Claims Was Licensed Under The "EULA" A Copy Of Which Is Attached Hereto As Exhibit "E"**

In 1999, Mr. Berry granted Fleming a license to use software that he had installed on Fleming's computers in Hawaii. The license does not identify the

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<sup>1</sup> The majority (if not all) of the files on this list were not authored by Wayne Berry and Mr. Berry has no rights to them. However, given Mr. Berry's inability, or refusal, to say which files he claims to have authored, the movant seeks to auction all of Mr. Berry's right title and interest in all of them.

filenames that it covers. The copyright to any and all such computer files covered by that license should be sold regardless of whether they are registered or not.

**D. Causes of Action**

1. All of the causes of action alleged by Wayne Berry in the Second Amended Complaint filed in the United States District Court for the District of New York entitled Wayne Berry vs. Deutsche Bank, et al. (a copy of which is attached hereto as Exhibit "F"); and
2. All of the causes of action alleged in the instant lawsuit.
3. All of the rights contained in the judgment contained in Berry v. Fleming, CV 01 00446 SPK LEK, aff'd, 243 Fed.Appx. 260.

The Sheriff should be ordered to, after giving public notice, hold a public auction at which the above identified property shall be sold to the highest bidder, subject to the lien in favor of the Internal Revenue Service which has already attached to all of the same property, and resulted in the transfer thereof (a copy of the tax lien is attached hereto as Exhibit "A").

The order should further provide that C&S Wholesale Grocers Inc., and the other judgment creditors herein should have the right to credit-bid for Wayne Berry's rights in and to the registered and unregistered copyrights as well as all causes of action and all rights existing in any pending lawsuits, subject to the tax lien and/or liens of the Internal Revenue Service.

This motion is based upon Hawaii Revised Statutes § 651-31 et seq., the inherent powers of Hawaii's Courts under Hawaii law to order a sale of patents, copyrights and causes of action in order to satisfy judgment creditors, Rules 7 and 69 of the Federal Rules of Civil Procedure, the attached Memorandum of Law, Declaration of Lex R. Smith and Exhibits attached hereto, and the record and file in this case.

DATED: Honolulu, Hawaii, June 5, 2008.

KOBAYASHI, SUGITA & GODA

/s/ Lex R. Smith  
LEX R. SMITH  
Attorney for C&S Wholesale  
Grocers, Inc.